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IN THE

Supreme Court of the United States

October Term, 1966.

No. 972.

UNITED STATES OF AMERICA,
Appellant,

v.

PROVIDENT NATIONAL BANK, CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, and WILLIAM B. CAMP, Acting Comptroller of the Currency.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO AFFIRM

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PROVIDENT NATIONAL BANK, CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Appellees Provident National Bank and Central-Penn National Bank move to affirm the judgment below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

1. INTRODUCTION

This is a suit by the Department of Justice to restrain a merger of the defendant Banks approved by the Comptroller of the Currency under the Bank Merger Act of 1966. The suit was dismissed with prejudice by the District Court on the eve of trial, because the Department of Justice re-

fused to sustain the burden of proof assigned to it by the Court in a pre-trial order. The dismissal by the District Court was a final judgment, such as would be entered on a directed verdict.

The complaint, the Comptroller's opinion, the relevant portions of the Bank Merger Act of 1966, and the three decisions of the District Court are printed as appendices to the Jurisdictional Statement and will be cited to that source in this motion.

2. HISTORY OF THE CASE

The history of this case can be said to begin with the enactment of the Bank Merger Act of 1960,[1] which was passed by Congress:

> "to provide for control of all mergers by asset acquisition by banks under the jurisdiction of the Federal banking agencies, under uniform and clear standards calling explicitly for consideration of both banking factors and competitive factors, but without giving sole and controlling effect to any single factor." Senate Report No. 196, 89th Cong., 1st Sess. (1959).

The 1960 Act required the bank regulatory agencies to consider the capital and earnings prospects of the banks, "the convenience and needs of the community to be served," and the possible effect of the proposed merger on competition. The Act specified that the agency should not approve the merger "unless, after considering all of such factors, it finds the transaction to be in the public interest."

In 1961, the Department of Justice sued to restrain the merger of Philadelphia National Bank and Girard Trust Corn Exchange Bank, which had been approved by the Comptroller under the 1960 Act. The District Court found for the defendants. This Court reversed, finding the merger (which would have created the largest bank in Philadel-

1. 74 Stat. 129 (1960).

phia) [2] to be in violation of Section 7 of the Clayton Act. The Court noted the argument of the defendants that Philadelphia needs a large bank to bring business to the area and stimulate its economic development, but said:

> "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." (374 U. S. 321, 371)

This Court's decision in *PNB-Girard* made a nullity of the bank regulatory agency's finding that the merger was in the public interest. The Bank Merger Act of 1966 was intended to reverse this result of *PNB-Girard* and to require the courts to consider the public interest just as the regulatory agencies are required to do. The 1966 Act permits the regulatory agency to approve an anticompetitive merger if the anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. To prevent a repetition of *PNB-Girard,* the Act further provides that if an approved merger is attacked in court, the court shall "review de novo" the issues presented and apply the "identical" standards which the agency is directed to apply (Jurisdictional Statement, p. 27).

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2. The bank resulting from the *PNB-Girard* merger would have held 36% of the bank assets in the Philadelphia area and would have been half again as large as its nearest competitor. In contrast, the bank resulting from the present merger will be the fourth largest in Philadelphia, holding less than 14% of the area's bank assets.

In November 1965, before the Bank Merger Act of 1966, the defendant Banks announced their intention to merge. On December 6, 1965, the Banks submitted to the Comptroller of the Currency an Application containing a fifty-page Economic Brief and supporting exhibits. These papers set forth the Banks' contentions that the merger will have no adverse effects on competition. They also show in detail that the merged bank will be better able to compete with the larger banks in Philadelphia, New York and other financial centers and will better serve the convenience and needs of the Philadelphia community—including those needs which this Court recognized, but held to be irrelevant, in *PNB-Girard*.

During the months that followed, the Banks, at the request of the Comptroller, filed with him voluminous supplemental material relating to competition and to the public interest to be served by the merger.

On March 31, 1966, the Comptroller issued his decision (Jurisdictional Statement, p. 28). He found that the merger "clearly conforms to the statutory criteria" of the Bank Merger Act of 1966 (*id.*, p. 51). He further found that "the competition which would be eliminated by this merger is miniscule," and that, on the contrary "the climate of competition would be stimulated by the increased capacity of a large scale bank, and the range of choices available to customers who require services which can only be rendered by a larger bank would be increased." (*Id.* at 49). He further found that the convenience and needs of the Philadelphia community would be served through the merger "by increased efficiency, by a greater lending capacity, through more adequate banking quarters, and by a generally improved quality of banking services. . . ." (*Id.* at 51).

The Comptroller concluded that: "We would be hindering the economic growth of Philadelphia if we failed to give our approval to this merger application." (*Ibid.*)

On April 1, 1966, the Department of Justice filed its complaint seeking an injunction under Section 7 of the Clayton Act. The complaint made no reference to the Bank Merger Act of 1966. Shortly thereafter, as permitted by the Act, the Comptroller intervened.

Throughout the pre-trial proceedings, the Department of Justice maintained that the Bank Merger Act of 1966 made no substantial change in the law concerning bank mergers. It argued that the Department need only prove a violation of Section 7 of the Clayton Act; that the burden of proof on the ultimate issue whether the merger is in the public interest (*i.e.*, whether any anticompetitive effects are clearly outweighed by the convenience and needs of the community) lies with the Banks; and that in reaching its decision on this point the District Court must disregard the administrative findings of public interest by the Comptroller. This position on the part of the Department of Justice, in due course, led to the dismissal of the action below. Thus:

(a) Pre-Trial Order No. 1 below (entered June 7, 1966) required the parties to file pre-trial briefs setting forth their legal contentions and the facts they expected to prove in support thereof. The factual sections of the Department's brief were limited almost entirely to the statistics from which it hoped to prove a violation of Section 7. The Bank Merger Act of 1966 was said to be an "exception" to the antitrust laws and therefore a part of the Banks' case only.

The Banks' pre-trial brief contained not only their contentions on competition, but also a detailed outline of the facts the Banks would prove to show that the merger is in the public interest. The Department's reply brief took no issue with these facts. Despite the fact that the Department had already received the Banks' answers to interrogatories as to convenience and needs, its reply brief said only that the Department "is not in a position to inform this Court whether

plaintiff believes the conclusions reached [in the Banks' pretrial brief] are correct or not." In short, the Department was unable to state a case on convenience and needs even by way of rebuttal.[3]

(b) In August, the Comptroller and the Banks moved to dismiss the complaint for failure to state a cause of action under the Bank Merger Act of 1966. The Department again argued that its sole responsibility was to state a claim under the Clayton Act. The Court sustained the complaint on the ground that, under principles of notice pleading, the Banks were sufficiently aware of the claim against them (Jurisdictional Statement, p. 17). The Court ruled, however, that:

> "The only suit open to Justice to enjoin a bank merger lies solely within the ambit of BMA-66." (*Id.* at 24)

(c) On November 4, the District Court heard argument as to the burden of proof and the weight to be given to the Comptroller's opinion. The Court then ruled that the proceedings would take the form of a review de novo similar to those in *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F. 2d 267, 271 (4th Cir. 1965); that the Court would hear all evidence in law and in fact, and if it then appeared that the Comptroller's decision was dependent on an exercise of discretion, the Court would bow to that discretion; but that, if the Comptroller appeared to have abused, exceeded, or arbitrarily applied his discretion, the Court would set aside his approval (Jurisdictional Statement, pp. 14, 16). The Court further ruled that the Department of Justice, in order to make out a

3. Under Pre-Trial Order No. 1, any issues, contentions or claims not set forth in the pre-trial briefs are to be deemed "abandoned, uncontroverted, or withdrawn." Accordingly, the Banks' case on community convenience and needs stands uncontroverted.

prima facie case, must establish that there are anti-competitive effects as defined in the Bank Merger Act and that these are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served (*id.* at 16, 17).

(d) On November 26, pursuant to order of the District Court, the Department of Justice filed a list of the witnesses it proposed to produce at the trial, together with an outline of their testimony—which was designed only to show a violation of the Clayton Act. The same document contained a "Statement of Position" which said that the Department did not intend, "in establishing a prima facie case, to offer proof either of the existence or the significance of 'convenience and needs' factors, if any there may be." The Banks subsequently filed a list of 18 witnesses and outlines of their testimony, disclosing the Banks' case on both competition and convenience and needs. A similarly lengthy list of witnesses, largely on convenience and needs, was filed by the Comptroller. To date, no rebuttal list has been filed by the Department.

(e) On December 2, by reason of the Department's "Statement of Position," the Banks filed a motion for final judgment such as would be entered under Rule 41(b) after completion of the plaintiff's case if the plaintiff had shown no right to relief.

(f) On December 29, the District Court dismissed the case with prejudice (Jurisdictional Statement, pp. 9, 14). In its opinion, the Court noted the Department's contention that, in determining the validity of the merger, the Court must come to its own conclusion "free of presumptions traceable to anyone," and said that this contention raises "the constitutional question of separation of powers." (*Id.* at 14). The Court concluded:

"The Court, therefore, finds that since Justice has definitely refused to try its case under BMA-66, the banks should not be subjected to the expense and inconvenience of a trial when Justice refuses to prove other than admitted facts to establish its case. Its position has been taken deliberately and directly in opposition to the ruling of the Court on October 13, 1966, and is consistent with the position of the Government on a nationwide basis, even though the Courts have been unanimous in refusing to accept its contention." (*Id.* at 12, 13).[4]

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4. The Court cited the following District Court decisions: *U. S. v. Mercantile Trust Company, et al.*, 1966 BNA Antitrust and Trade Reg. Rep. No. 286 (1/3/67) page X-6, (E. D. Mo. December 19, 1966); *U. S. v. First City National Bank of Houston, et al.*, Civ. No. 66-H-695, S. D. Texas (oral opinion of December 2, 1966), Appendix A, Jurisdictional Statement, Case No. 914, October Term, 1966; *U. S. v. First National Bank of Hawaii, et al.*, Civ. No. 2540, D. Hawaii, 1966 (oral opinion of October 31, 1966, unreported); and *U. S. v. Crocker-Anglo National Bank, et al.*, 1966 Trade Reg. Rep. ¶ 71,898 (N. D. Cal.).

3. ARGUMENT

The Court below took the position that the function of the District Court under the Bank Merger Act of 1966 is to review the decision of the Comptroller. The Court will hear the evidence "de novo" (unavoidably since there was no hearing before the Comptroller), but the judgment it will make is whether the Comptroller acted within the bounds of the discretion entrusted to him by the Bank Merger Act, not whether the Court believes the merger to be in the public interest and not whether the merger would violate Section 7 of the Clayton Act (Jurisdictional Statement, p. 14). In no other way can the Bank Merger Act be construed constitutionally, since the determination of public interest is administrative and not judicial (Jurisdictional Statement, p. 12). In no other way can the Act be construed consistently with Congress' reiterated intent to empower the bank regulatory agencies to authorize mergers where the public interest clearly outweighs any visible impairment to competition (Jurisdictional Statement, p. 17).

The District Court's Decision As To Its Function Follows Established Precedent.

In construing the Bank Merger Act to require a review of the administrative finding of public interest, the Court below was following the ruling of the three-judge District Court in California which said: "It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term '*de novo*' does not speak of a trial de novo but of a *review de novo*." *U. S. v. Crocker-Anglo National Bank, et al.*, 1966 Trade Reg. Rep. ¶ 71,898, page 83,156.

The California Court, like the Court below, based its decision on the constitutional separation of powers, saying:

> ". . . the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." 1966 Trade Reg. Rep. ¶ 71,898, page 83,154.

The findings of the California Court and the Court below with respect to the constitutional limitation on their powers is in accord with the decisions of this Court and is clearly correct. A constitutional court cannot "exercise or participate in the exercise of functions which are essentially legislative or administrative," *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 469 (1930). The "ultimate reckoning of social or economic debits and credits . . . . is beyond the ordinary limits of judicial competence," *U. S. v. Philadelphia National Bank, et al.*, 374 U. S. 321, 371 (1963).[5]

The District Court's Decision As To Procedure Follows Established Precedent.

Having established that its function is to review the Comptroller's decision, the District Court assigned to the Department of Justice "the overall burden of persuasion to show the illegality of the merger" (Jurisdictional Statement, p. 17). This is the normal burden of persuasion undertaken by any plaintiff or petitioner seeking review of an administrative decision.

> "Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a pre-

5. See also, *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17 (1952); *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 (1933).

sumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission v. Hope Gas Co.*, 320 U. S. 591, 602 (1944). See also, *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503, 512-513 (1944).

Normal review proceedings such as *Hope Gas* and *Jersey City* involve only the burden of persuasion. There is no occasion to consider the burden of producing evidence because there is no new evidence. The review is made on the record before the administrative body. In this case, however, the statute requires the review to be de novo, and the District Court held that in such a review the Department of Justice has the burden of coming forward with evidence (Jurisdictional Statement, pp. 16-17). In so doing, it was following *First National Bank of Smithfield, North Carolina v. Saxon, supra.*[6]

In the *Smithfield* case, the Comptroller had, without formal hearing,[7] approved a branch application in Smithfield, North Carolina. Thereafter, a competing bank filed an action to have the Comptroller's determination declared illegal on the ground that the failure to hold a hearing deprived the competing bank of due process of law. The Court of Appeals for the Fourth Circuit held that no hearing before the Comptroller was required, but that the competing bank was entitled to a full-dress hearing before the District Court.[8] The Court of Appeals said:

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6. See also, *Webster Groves Trust Company v. Saxon*, Opinion of the Eighth Circuit Court of Appeals dated December 14, 1966 (reported in 35 L. W. 2348).

7. As is the case with mergers under the Bank Merger Act of 1966, no hearing on branch applications is required by the Banking Act.

8. The Court cited Section 10 of the Administrative Procedure Act (5 U. S. C. A. § 1009), which, in subsection (e), contemplates that the facts may be subject to trial de novo by the reviewing court.

> "The Banking Act, 12 U. S. C. § 36(c), in permitting bank branching 'with the approval of the Comptroller of the Currency' intended, we think, to allow the Comptroller to consider as a factor in his decision to grant or refuse approval, the public interest, need and necessity, and, subject to court review, to exercise his discretion in determining such interest, need or necessity. . . . On the remand of this case, the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller's approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge de novo the validity, in fact and in law, of the Comptroller's final action." (352 F. 2d at 272)

As to the scope of review the Court of Appeals said:

> "If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion." (352 F. 2d at 272)

The Court of Appeals characterized the foregoing procedure as a "review de novo" (352 F. 2d at 273).

In assigning to the Department of Justice the burden of persuasion and the burden of production of evidence on the ultimate issue of public interest, the District Court rejected the Department's contention that the Department can make out a prima facie case by showing merely a violation of the Clayton Act. The District Court said: "Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act." (Jurisdictional Statement, p. 17).

The authority for the lower Court's ruling on this point is this Court's decision in *Seaboard Air Line R. Co. v. U. S.*, 382 U. S. 154 (1965). In *Seaboard*, the three-judge District Court had set aside an I. C. C. order approving a railroad merger because the I. C. C. had not determined whether the merger violated § 7 of the Clayton Act. This Court said: "By thus disposing of the case, the District Court did not reach the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition" (382 U. S. at 156).

The Department Of Justice's Position Is Insubstantial.

The Department of Justice contends that the function of the District Court is to try the case de novo and come to its own conclusions as to the legality of the merger "independently of the Comptroller and free of presumptions traceable to anyone."

The fundamental infirmity in the Department's position is that it is unconstitutional. The cases cited above leave no doubt on that score. The Banks made the constitutional argument in their pretrial brief. The District Court rested its opinion squarely on the constitutional ground. The Department has never answered the point, and there is no hint of an answer in its Jurisdictional Statement. There can be no need for further argument where none has ever been made.

A second infirmity in the Department's position is that it would nullify the expertise of the bank regulatory agencies and leave the question of public interest in bank mergers to be decided by the District Courts. The actions of the regulatory agencies in passing upon bank merger applications are not isolated decisions—they are part of the overall regulatory process by which the agencies evolve a banking structure adequate to the public need. These decisions should be subject to review, like those of other administrative agencies. They should not be made anew

by whichever District Judges happen to be assigned to the bank merger cases which the Department of Justice elects to file.

The final infirmity in the Department's position is that it would nullify the Bank Merger Act of 1966 and perpetuate the situation which Congress sought to correct by enacting that statute.

The arguments which the Department of Justice has advanced in support of its position can be readily disposed of:

(a) The Department argues that convenience and needs is an "exception" to be proved by the Banks. In fact, the statute requires the regulatory agency to consider convenience and needs "in every case" (Jurisdictional Statement, p. 27). As the history of this case shows, every bank merger which becomes the subject of litigation will involve a contention by the Department that the merger is anticompetitive and a finding by the regulatory agency that it is nevertheless in the public interest. (If the agency found that the anticompetitive effects were paramount, it would not approve the merger in the first place). Thus, the validity of the agency's finding as to public interest is not a matter of exception; it is the ultimate issue in every case.[9]

(b) The Department also argues that the Banks should have the burden of proving convenience and needs because they have better access to the facts. Again, the refutation is to be found in the history of

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9. The Department analogizes convenience and needs under the Bank Merger Act to the affirmative defense of cost justification under the Robinson-Patman Act. The difference is obvious. There is no weighing under the Robinson-Patman Act. If a defendant shows cost justification, he wins, regardless of the injury to competition. The Bank Merger Act requires in every case a weighing of convenience and needs against anticompetitive effects. The legality of the merger depends on this weighing—which is an administrative process.

this case. The Banks have already shown how the merger will serve the convenience and needs of the community in their application (which is supplied to the Department as a basis for its advisory report) and in their supplementary material (much of which was also sent to the Department). The Comptroller has made his findings as to convenience and needs. The Banks have stated their contentions at length in their pretrial brief and outlines of testimony. And they have answered the Department's interrogatories directed at this issue. The Department's problem is not that it does not know the Banks' contentions, but rather that it has no answer to them.

(c) The Department of Justice relies on quotations from legislators and a letter from the Attorney General to Congressman Patman during the legislative hearings. With respect to the quotations, the California Court remarked that "Counsel have largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he 'would be against it as a matter of principle.' (Cong. Rec. Feb. 8, 1966, p. 2357). Counsel's choice of makers of remarks is not very persuasive."[10] With respect to the Attorney General's letter, it will be seen that the Attorney General was concerned because the bill then pending did not provide for a full hearing before either the Comptroller or the District Court. He suggested a "trial de novo" in the Court. Congress accepted his suggestion to the extent of providing for a full hearing allowing testimony de novo on all issues. But it provided that the hearing should be a "review"—not a "trial."

10. 1966 Trade Reg. Rep. ¶ 71,898, page 83,152, fn. 3.

4. CONCLUSION

The decision of the Court below rests on settled principles of law, firmly established by this Court and others. Application of these principles to the issues presented by this appeal has been unanimously upheld by all the lower courts to whom the issues have been presented. The contentions of the Department of Justice would violate the Constitution and would lead to the undesirable result of having the public interest in bank mergers determined by District Courts rather than the bank regulatory agencies. Under these circumstances, review is unnecessary.

Respectfully submitted,

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